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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JAMES YANCY,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

G045213

(Super. Ct. No. M11040)

O P I N I O N

Original proceedings; petition for a writ of mandate/prohibition to challenge an order of the Superior Court of Orange County, Richard M. King, Judge. Petition denied.

Deborah A. Kwast, Public Defender, Frank Ospino, Interim Public Defender, Jean Wilkinson, Chief Deputy Public Defender, Denise Gragg and Mark S. Brown, Assistant Public Defenders, for Petitioner.

No appearance for Respondent.

Tony Rackauckas, District Attorney, and Elizabeth Molfetta, Deputy District Attorney, for Real Party in Interest.

* * *

INTRODUCTION

In October 2002, James Yancy was found to be a sexually violent predator under the Sexually Violent Predator Act, Welfare and Institutions Code section 6600 et seq. (SVPA)¹ and was committed for two years. He was the subject of SVPA recommitment petitions filed in 2004 and 2006. He filed a plea in abatement in the trial court, seeking dismissal of the SVPA commitment petition on the ground it was not supported by the concurrence of the two evaluators appointed pursuant to section 6601 after our decision in *In re Ronje* (2009) 179 Cal.App.4th 509 (*Ronje*). His petition for writ of mandamus/prohibition challenges the trial court's order denying his plea in abatement.

Following our decision in *Boysel v. Superior Court* (Mar. 28, 2012, G045202) __ Cal.App.4th __ (*Boysel*), we deny the writ petition without prejudice to renewing the challenge to the SVPA commitment petition based on a consideration of the full reports of all four post-*Ronje* evaluators.

ALLEGATIONS OF THE PETITION AND THE RETURN

In October 2002, Yancy was found to be a sexually violent predator under the SVPA and was committed to the State Department of Mental Health (DMH) for treatment. The Orange County District Attorney filed a petition for recommitment in October 2004 and a petition for recommitment in 2006 (the SVPA Petition). The SVPA Petition was based on evaluations of Yancy conducted by Clark Clipson, Ph.D., and Shoba Sreenivasan, Ph.D., both of whom concluded Yancy met the criteria for commitment as a sexually violent predator.

¹ Further code references are to the Welfare and Institutions Code unless otherwise indicated.

In October 2006, Judge Kazuharu Makino reviewed the SVPA Petition and found it stated sufficient facts which, if true, would constitute probable cause to believe Yancy was likely to engage in sexually violent predatory criminal behavior on his release from commitment. As a consequence, Judge Makino ordered Yancy to be detained pursuant to section 6601.5 in a secured facility until the probable cause hearing.

Judge Richard M. King conducted a probable cause hearing in January 2007. Judge King found, pursuant to section 6602, probable cause existed to believe Yancy met the criteria for commitment as a sexually violent predator.

In August 2008, the state Office of Administrative Law (OAL) issued 2008 OAL Determination No. 19, in which the OAL determined the 2007 version of the DMH's assessment protocol amounted to an "underground regulation" because portions of the assessment protocol, though regulatory in nature, had not been adopted pursuant to the Administrative Procedure Act, Government Code section 11340.5. (See *Ronje*, *supra*, 179 Cal.App.4th at p. 515.) In *Ronje*, *supra*, 179 Cal.App.4th at pages 516-517, we agreed with the OAL and likewise concluded the 2007 assessment protocol was invalid as an underground regulation.

In 2009, the DMH drafted a new standardized assessment protocol for SVPA evaluations. Pursuant to Government Code section 11349.6, subdivision (d), the OAL approved the new assessment protocol in September 2009.

In March 2010, Yancy filed a motion requesting, among other things, that, in light of *Ronje*, the trial court order new evaluations to be conducted to determine whether he is a sexually violent predator. In November 2010, Judge James P. Marion granted the motion and ordered new evaluations of Yancy, pursuant to section 6601, and a new probable cause hearing pursuant to *Ronje* based on the new evaluations.

In compliance with the court order, the DMH reassigned Dr. Sreenivasan and Dr. Clipson to evaluate Yancy. In a report dated January 25, 2011, Dr. Sreenivasan concluded Yancy continued to meet the criteria for commitment as a sexually violent

predator. In a report dated February 24, 2011, Dr. Clipson concluded Yancy no longer met those criteria.

Due to the difference of opinions, the DMH ordered independent evaluations of Yancy to be conducted by Michael Selby, Ph.D., and Christopher Matosich, Ph.D. In a report dated February 28, 2011, Dr. Matosich concluded Yancy met the criteria for commitment as a sexually violent predator. In a report dated March 14, 2011, Dr. Selby concluded Yancy did not meet those criteria.

In March 2011, Yancy filed a plea in abatement seeking dismissal of the SVPA Petition based on Dr. Clipson's post-*Ronje* report only. The district attorney did not file a formal opposition. In a supplemental memorandum of points and authorities, Yancy requested that his plea in abatement also be considered a demurrer under Code of Civil Procedure section 430.10, subdivision (a) and a nonstatutory motion to dismiss.

In April 2011, Judge King issued an order denying the pleas in abatement filed by Yancy and nine others. The full evaluation reports of Dr. Sreenivasan, Dr. Clipson, Dr. Selby, and Dr. Matosich were not presented to the trial court, which apparently considered only the results of their evaluations when it denied Yancy's plea in abatement.

The next month, Yancy filed his petition for writ of mandate/prohibition. We issued an order to show cause and stayed the trial court proceedings.

DISCUSSION

In *Ronje, supra*, 179 Cal.App.4th 509, we held the use of an invalid assessment protocol in conducting mental evaluations of a person suspected to be a sexually violent predator constituted an error or irregularity in a commitment proceeding under the SVPA. As a remedy, we directed the trial court to order new evaluations pursuant to section 6601 using a valid assessment protocol.

In *Boysel, supra*, __ Cal.App.4th __, *Wright v. Superior Court* (Mar. 28, 2012, G045203) __ Cal.App.4th __ (*Wright*), and *Reilly v. Superior Court* (Mar. 28,

2012, G045118) __ Cal.App.4th __ (*Reilly*), we addressed whether, before the probable cause hearing, a person named in an SVPA commitment petition may challenge the petition on the ground of lack of concurring evaluators, by means of a plea in abatement, nonstatutory motion to dismiss, or nonstatutory pleading. We concluded that *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 912-913 (*Ghilotti*) authorizes the use of a nonstatutory pleading to challenge an SVPA commitment proceeding, before the probable cause hearing, on the ground of lack of the required concurring evaluations. We deem Yancy's plea in abatement to have constituted such a nonstatutory pleading.

In *Boysel*, *Wright*, and *Reilly*, we addressed the effect of post-*Ronje* evaluations in different scenarios. In *Boysel*, *supra*, __ Cal.App.4th __, the two initial post-*Ronje* evaluators disagreed whether the person named in the SVPA commitment petition met the criteria for commitment as a sexually violent predator. Although two independent post-*Ronje* evaluators had been appointed pursuant to section 6601, subdivision (e), their reports were not before the trial court when it denied the challenge to the SVPA commitment petition. In *Wright*, *supra*, __ Cal.App.4th __, the two initial post-*Ronje* evaluators likewise disagreed whether the person named in the SVPA commitment petition met the criteria for commitment as a sexually violent predator, but there was no evidence in the record that two independent post-*Ronje* evaluators have been appointed. In *Wright* and *Boysel*, we denied the petitions for writ of mandamus/prohibition without prejudice to later renewing the challenge to the SVPA commitment petitions. In *Reilly*, *supra*, __ Cal.App.4th __, the two initial post-*Ronje* evaluators agreed the person named in the SVPA petition no longer met the criteria for commitment as a sexually violent predator, and, therefore, we were compelled by the SVPA to grant the writ petition in that case.

This case is similar to *Boysel*, *supra*, __ Cal.App.4th __, in that the full reports of the post-*Ronje* evaluators were not before the trial court when it denied Yancy's plea in abatement. The plea in abatement was based entirely on Dr. Clipson's

report. Although the results of all four post-*Ronje* evaluations were provided to the trial court, it should have the opportunity to consider the full reports and address any *Ghilotti* challenges to them. As in *Boysel*, our decision to deny Yancy's writ petition is without prejudice to renewing the challenge to the SVPA Petition in the trial court by motion or pleading pursuant to *Ghilotti*, based on the full reports of all post-*Ronje* evaluators.

DISPOSITION

The petition for writ of mandate/prohibition is denied and the stay of the trial court proceedings is lifted.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.